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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

**DECISION**  
Case #: FTI - 203677

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**PRELIMINARY RECITALS**

Pursuant to a petition filed on November 10, 2021, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Milwaukee Enrollment Services regarding FoodShare benefits (FS), a hearing was held on December 8, 2021, by telephone.

The issue for determination is whether the petitioner's appeal of the agency's tax intercept action was filed timely.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, WI 53703

By: [REDACTED]  
Milwaukee Enrollment Services  
1220 W Vliet St  
Milwaukee, WI 53205

**ADMINISTRATIVE LAW JUDGE:**

Beth Whitaker  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. The agency issued to petitioner an overpayment notice, informing him that he was overpaid FS benefits in the amount of \$3,297 for the period from September 1, 201 to August 31, 2013 (claim number [REDACTED]).
3. Through October 9, 2020, the overpayment balance was reduced to \$2,322 through recoupment of ongoing FS benefits.
4. On December 11, 2020, the agency issued to petitioner a notice entitled Important Notice about your State Tax Refund and Credits, informing that he had been previously notified of an unpaid debt for excess public assistance, with a balance of \$2,322, which may be intercepted from tax refunds or credits due to him. It further informed him that he had 30 days to appeal the determination.
5. On April 1, 2014, July 1, 2015, October 1, 2018 and November 2, 2020, the agency issued to petitioner dunning notices regarding the overpayment balance due.
6. On August 23, 2021, September 27, 2021, October 18, 2021 and November 22, 2021 the agency issued to petitioner repayment agreements, none of which he completed and returned.
7. On November 10, 2021, petitioner filed a request for hearing by telephone.

### **DISCUSSION**

State FS agencies must “establish a claim against any household that has received more [FS] benefits than it is entitled to receive.” 7 CFR § 273.18(a). And, under certain circumstances, the department may recover an overpayment from a liable person by intercepting her state income tax refund. Wis. Stat. §49.85. Before doing so however, the department must notify that person of its intention to certify the overpayment to the Department of Revenue for setoff from his/her state income tax refund and of the person’s right to appeal the tax intercept by requesting a hearing. Id. at §49.85(3). An appeal of a FS overpayment must be filed within 90 days of the date of that action. 7 C.F.R. § 273.15(g); Wis. Admin. Code §§HA 3.05(3)(a) and 3.03(3). An appeal of a notice of state tax intercept must be filed within 30 days of the date of the notice. Wis. Stat., §49.85(3)(a)2; FoodShare Handbook (FSHB) §7.3.2.11.

Petitioner testified at hearing that he never received the FS benefits in question. He testified that documents relevant to this matter that were once in his possession were destroyed by his dog. He testified that he did not receive the tax intercept notice mailed to him at the address he provided. He admitted that he had not changed his address since 2011 and the address used by the agency was the correct one.

The notice was sent to petitioner’s correct address and not returned to the respondent as undeliverable. Where the evidence presented demonstrates that a notice was correctly mailed, this fact creates a rebuttable presumption of delivery that a petitioner must overcome with evidence demonstrating that the notice was not actually received.

This interpretation is confirmed by Wisconsin case law:

It is well established that the mailing of a letter creates a presumption that the letter was delivered and received. See, *Nack v. State*, 189 Wis. 633, 636, 208 N.W. 487(1926), (citing *Wigmore, Evidence*(2d. ed.) § 2153; 1 *Wigmore, Evidence* (2nd ed.) § 95) *Mullen v. Braatz*, 179 Wis. 2d 749, 753, 508 N.W.2d 446(Ct.App.1993); *Solberg v. Sec. Of Dept of Health & Human Services*, 583 F.Supp. 1095, 1097 (E.D.Wis.1984); *Hagner v. United States*, 285 U.S. 427, 430, 52. S.Ct. 417, 418(1932).

\*\*\* (Portions of discussion not relevant here omitted). This evidence raises a rebuttable presumption which merely shifts to the challenging party the burden of presenting

credible evidence of non-receipt. *United States v. Freeman*, 402 F.Supp. 1080, 1082(E.D.Wis.1975). Such a presumption may not, however, be given conclusive effect without violating the due process clause. *United States v. Bowen*, 414 F.2d 1268, 1273(3d.Cir.1969); *Mullen v. Braatz*, 179 Wis. 2d at 453. If the defendant denies receipt of the mailing, the presumption is spent and a question of fact is raised. (Examiner note: Citations omitted here.) The issue is then one of credibility for the factfinder. The factfinder may believe the denial of receipt, or the factfinder may disbelieve the denial of receipt.

See *State ex. Rel. Flores v. State*, 183 Wis.2d 587, at 612-3 ((1994).

Petitioner offered nothing to rebut this presumption other than to state that it was not received, for reasons unknown. That is insufficient. The notice is presumed delivered. The deadline to appeal was January 11, 2021. Petitioner's appeal was filed on November 10, 2021. It was late.

An administrative law judge can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely. It is the longstanding position of DHA that its hearing examiners lack the authority to render a decision on equitable grounds. See, *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. Because, petitioner failed to file his requests for hearing by the deadline, I must dismiss the appeal.

### **CONCLUSIONS OF LAW**

The appeal was not filed timely. I have no jurisdiction over the matter.

**THEREFORE, it is**

**ORDERED**

That the petition for review is dismissed.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5<sup>th</sup> Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES

IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

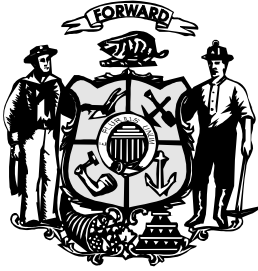
Given under my hand at the City of Madison,  
Wisconsin, this 6th day of January, 2022



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Beth Whitaker  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on January 6, 2022.

Milwaukee Enrollment Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability